**MWE PROPERTIES SDN BHD**

**v.**

**SAW LIP KEAN**

COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
[APPEAL NO: W-02-1395-2009]
6 APRIL 2011

***CONTRACT:*** *Breach - Breach amounting to repudiation - Whether respondent's actions amounted to repudiation of contract - Evidence adduced - Whether appellant entitled to terminate contract and forfeit deposits and payments made thereunder - Conduct of parties*

***CONTRACT:*** *Breach - Sale of property - Respondent not wishing to proceed with purchase of property and seeking for refund of monies paid - Whether he had been entitled to it - Factors to consider - Whether obtaining of bank loan a condition precedent to purchase of property - Evidence adduced - Whether established by respondent - Effect of - Whether respondent entitled to terminate contract and get a refund of his monies - Whether respondent by his actions in breach of contract*

***CONTRACT:*** *Formation - No written contract signed between parties - Whether contract existed between parties - Factors to consider*

The respondent signed four sales proforma forms for the purchase of lots 48, 49, 50 and 51 and paid earnest deposits for each lot. Subsequently the respondent informed the appellant that he wished to forgo his purchase of lot 51 and requested for a refund of his earnest deposit. The appellant informed the respondent that the earnest deposit for lot 51 would be transferred to the account of lot 48. No sale and purchase agreement was signed by the parties. The respondent then informed the appellant that he would not be proceeding with the purchase of lot 50 as he could not secure a loan and expressed interest in the appellant's Special Payment Scheme ('SPS') for the purchase of lots 48 and 49. The appellant gave the respondent a proposal on the SPS. The respondent then asked the appellant for a refund of the monies paid for lot 50 and/or for a transfer of those monies to the accounts of lots 48 and 49. The appellant denied agreeing to the cancellation of lot 50, suggested that the respondent find another buyer for the said lot and refused to return the monies paid for

A the same. Then the appellant terminated the respondent's purchase of lot 50 and withdrew its proposal for the SPS. The appellant then placed lots 48 and 49 under the SPS subject to terms, to which the respondent disagreed. This culminated in the respondent deciding to discontinue with the purchase of lots 48
B and 49. Negotiations took place between the parties to no avail. Subsequently the appellant terminated the sale of lots 48 and 49 and forfeited the respondent's monies based on the terms in the sale proforma forms. The respondent sent a notice of demand to the appellant and then filed an action against the appellant, which
C after full trial was determined in the respondent's favour. Hence this appeal. The issues that arose for determination before the court were whether there had been a concluded contract/ agreement between the parties and if the answer was in the affirmative, whether the respondent had been in breach of the
D contract when he had discontinued with the purchase of lots 48 and 49 and ultimately whether the respondent had been entitled to the refund of the deposits and part payments paid to the appellant.

E **Held (allowing the appeal)**
**Per Ramly Ali JCA delivering the judgment of the court:**

**(1)** There had been a concluded contract between the appellant and the respondent despite the want of a duly executed formal written agreement. All the necessary ingredients to
F constitute a contract had been in existence through the sales proforma forms signed by the respondent, the exchange of correspondences that had followed as well and the conduct of the parties. (para 23)

G **(2)** The contract to purchase the four shoplots had already come into existence when the respondent had booked the shoplots and signed the sale proforma forms. The failure of the respondent to adhere to it had amounted to a repudiation of the contract to purchase which had resulted in the right of
H the appellant to terminate the contract and to forfeit the deposits and payments made. At all material times, the appellant had been willing to proceed with the sale and purchase of the properties and it had been the respondent who had refused to sign the formal agreement and proceed
I with the purchase of the same. (paras 27 & 28)

**(3)** The respondent's contention that the bank loan had been a condition precedent to the purchases could not be accepted. The respondent had never informed of his financial incapacity to purchase as he had never indicated his requirement of a loan when he had signed the sales proforma forms. The issue on the SPS had happened long after the contract between the parties had been concluded and all the appellant's proposals under the SPS scheme had been rejected by the respondent without reasonable grounds. As such, the time indulgence under the SPS had not been binding and the only contract that had existed between the parties had been the sales proforma forms with pre-agreed terms and conditions. Thus the respondent could not terminate the purchase of the shoplots solely on the ground that he had been unable to obtain a loan from the bank or that he had not been agreeable to the time indulgence given by the appellant under the SPS as with the signing of the sales proforma, the contract had already come into existence and whatever had transpired after that could not affect it. (paras 33-39)

**(4)** There had not been any provision in the sales proforma forms signed by the respondent indicating that he had been entitled to a refund of the monies paid as deposits and part payments towards the purchase price of the properties, in the event the respondent chose not to proceed with the purchase of the properties. Applying the principle in *Thomas*, the respondent had not been entitled to the refund of the deposits as well as the part payments made in respect of the purchase of the shoplots. (paras 40, 43, 44-45)

***Bahasa Malaysia*** *Translation Of Headnotes*

Responden telah menandatangani empat borang proforma jualan untuk pembelian lot-lot 48, 49, 50 dan 51 dan telah membuat bayaran deposit cengkeram (earnest deposit) bagi setiap lot tersebut. Responden kemudiannya telah mengambil keputusan untuk tidak meneruskan dengan pembelian lot 51 dan telah memberitahu perayu mengenainya dan seterusnya meminta pemulangan deposit cengkeramnya. Perayu telah memberitahu responden bahawa deposit cengkeramnya bagi lot 51 akan dipindahkan kepada akaun responden bagi lot 48. Perjanjian jual-beli tidak ditandatangani antara pihak-pihak berkenaan. Responden kemudiannya telah memberitahu perayu bahawa beliau tidak akan meneruskan dengan pembelian lot 50 kerana beliau gagal

mendapatkan pinjaman dan menunjukkan minat ke atas Special Payment Scheme ('SPS') perayu bagi lot-lot 48 dan 49. Perayu telah memberikan satu cadangan kepada responden berkenaan SPS. Responden kemudiannya telah meminta perayu untuk pemulangan wang yang telah dibayar bagi lot 50 dan/atau untuk pemindahan wang tersebut kepada akaun lot-lot 48 dan 49. Perayu menafikan bahawa mereka telah bersetuju kepada pembatalan pembelian lot 50, mencadangkan agar responden mencari pembeli baru bagi lot tersebut dan enggan memulangkan wang yang telah dibayar oleh responden bagi lot tersebut. Perayu kemudiannya telah membatalkan pembelian responden untuk lot 50 dan menarik balik cadangannya berkenaan SPS. Lot-lot 48 dan 49 kemudiannya telah diletak dibawah SPS oleh perayu, tertakluk kepada terma, yang mana tidak dipersetujui oleh responden. Responden telah mengambil keputusan untuk tidak meneruskan dengan pembelian lot-lot 48 dan 49. Perbincangan telah berlaku antara pihak-pihak tetapi tiada kata putus tercapai. Perayu telah menamatkan penjualan lot-lot 48 dan 49 dan telah merampas wang responden berdasarkan terma-terma yang terkandung di dalam borang jualan proforma. Responden telah menghantar surat tuntutan kepada perayu dan kemudian telah memfailkan suatu tindakan terhadapnya di mana keputusan mahkamah telah berpihak kepada responden. Oleh itu, rayuan ini telah difailkan. Isu-isu yang timbul untuk pertimbangan Mahkamah ini adalah sama ada terdapat satu kontrak yang telah wujud antara pihak-pihak dan sekiranya jawapan kepada itu adalah positif, sama ada responden telah mengingkari kontrak tersebut melalui tindakannya untuk tidak meneruskan dengan pembelian lot-lot 48 dan 49 dan akhir sekali sama ada responden berhak untuk mendapatkan pemulangan wang depositnya dan bayaran-bayaran lain yang telahpun dibayar kepada perayu.

**Diputuskan (membenarkan rayuan)**
**Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:**

**(1)** Walaupun tiada perjanjian bertulis secara rasmi, suatu kontrak telah wujud antara perayu dan responden. Semua unsur-unsur yang perlu untuk mewujudkan suatu kontrak terkandung di dalam borang jualan proforma yang telah ditandatangani oleh responden, melalui pertukaran surat antara pihak-pihak dan juga melalui kelakuan pihak-pihak berkenaan.

**(2)** Kontrak untuk pembelian empat rumah kedai tersebut telahpun wujud apabila responden membuat tempahan serta menandatangani borang jualan proforma. Kegagalan responden untuk berpegang kepadanya merupakan suatu repudiasi kontrak pembelian yang telah memberikan hak kepada perayu untuk menamatkan kontrak dan merampas deposit dan bayaran-bayaran yang telah dibuat olehnya. Pada semua masa yang material, perayu ingin meneruskan dengan jual beli rumah kedai tersebut dan responden merupakan pihak yang enggan menandatangani perjanjian rasmi dan meneruskan dengan pembeliannya.

**(3)** Hujahan responden bahawa pinjaman daripada bank merupakan suatu syarat duluan atau prasyarat kepada pembelian lot-lot tersebut, tidak dapat diterima. Responden tidak pernah memberitahu perayu mengenai ketidakupayaannya dari segi kewangan untuk membeli lot-lot tersebut dan beliau gagal untuk memberitahu tentang keperluannya untuk mengambil pinjaman apabila beliau menandatangani borang jualan proforma. Isu berkenaan SPS telah berlaku jauh selepas kontrak antara pihak-pihak telah wujud dan semua cadangan perayu dibawah skim SPS tersebut telahpun ditolak oleh responden tanpa alasan yang munasabah. Oleh itu, pemanjangan masa yang telah diberikan di bawah skim SPS tersebut tidak mengikat dan hanya borang proforma dengan syarat dan terma yang telah dipersetujui merupakan kontrak antara pihak-pihak berkenaan. Maka responden tidak mempunyai hak untuk menamatkan pembelian rumah kedai-rumah kedai tersebut hanya atas alasan bahawa beliau gagal untuk mendapatkan pinjaman dari bank ataupun kerana beliau tidak bersetuju dengan pemanjangan masa yang telah diberikan oleh perayu di bawah SPS tersebut kerana dengan menandatangani borang jualan proforma tersebut, kontrak telahpun wujud dan sebarang peristiwa yang berlaku selepas itu tidak dapat memberi kesan kepadanya.

**(4)** Borang jualan proforma yang telah ditandatangani oleh responden tidak mengandungi terma yang memberikan hak kepada responden untuk mendapatkan pemulangan depositnya ataupun bayaran-bayaran yang telah dibuat olehnya terhadap harga belian lot-lot tersebut, sekiranya beliau mengambil keputusan untuk tidak meneruskan dengan pembelian lot-lot

tersebut. Menggunapakai prinsip dalam kes *Thomas*, responden tidak berhak kepada pemulangan depositnya ataupun bayaran-bayaran yang telah dibuat oleh beliau berkenaan pembelian lot-lot tersebut.

**Case(s) referred to:**
*Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC* ***(refd)***
*Cornish v. Abington 4H & N549* ***(refd)***
*Duke of Cadaval v. Collins, 4 A & E 858* ***(refd)***
*Hillas & Co. v. Arcos Ltd [1932] All ER Rep 494* ***(refd)***
*Lin Nyuk Chan v. Wong Sz Tsin [1964] 1 LNS 94 FC* ***(refd)***
*Thomas v. Brown [1876] 1 QBD 714*

*For the appellant - Low Joo Hean (Suriyany Abd Majid with him); M/s Ching Tan & Assoc*
*For the respondent - M Yunus Ali; M/s Yunus Ali & Co*

*Reported by Sharmini Pillai*

## JUDGMENT

**Ramly Ali JCA:**

**[1]** The respondent's claim against the appellant in the present case is for the refund of RM742,213.46 being deposits and part payments made by the respondent to the appellant for the purchase of four units of shoplots, being Lot 48, Lot 49, Lot 50 and Lot 51 in Sri Bintang Height, Segambut, Kuala Lumpur. The appellant was the developer and vendor of the said shoplots and the respondent was the purchaser.

**[2]** The appellant's counterclaim against the respondent is for a sum of RM102,786.54 as a loss suffered by the appellant as a result of the respondent's breach in not proceeding with the purchase of the shoplots.

**[3]** After full trial, the learned High Court judge allowed the respondent's claim but dismissed the appellant's counterclaim. Hence the present appeal.

## Brief Facts

**[4]** Sometime on 2 November 1996, the respondent signed four sales proforma forms, all dated 2 November 1996, for the purchase of the four shoplots in question and paid the initial earnest deposits of RM20,000 for each lot. The purchase price of each lot are as follows:

(a) Lot 48 – RM895,000

(b) Lot 49 – RM695,000

(c) Lot 50 – RM695,000

(d) Lot 51 – RM695,000

**[5]** According to the respondent, at the time he paid the earnest deposits, a member of the staff of the appellant had told him that the appellant's panel banks could give him loan up to 80% of the purchase price.

**[6]** Subsequently, on 17 December 1996, the purchase price of Lot 48 was increased from RM895,000 to RM1,180,000. Later the price was reduced to RM1,160,000 on the respondent's request.

**[7]** Due to the increase in the price of Lot 48, the respondent had on 24 March 1999, informed the appellant that he decided to forgo his purchase of Lot 51 and requested for the refund of the earnest deposit that he had paid for Lot 51. However, the appellant informed the respondent that the amount RM69,500 that the respondent had paid as earnest deposit for Lot 51 will be transferred to the account of Lot 48.

**[8]** At the material time, the parties had not signed any sale and purchase agreement yet for the purchase. It was deferred on the ground that the respondent had indicated that he can only sign the sale and purchase agreements once he got the approval from the Registrar of Companies for the incorporation of a new company that he had set up for the purpose of the purchase. The company was incorporated on 15 November 1997.

**[9]** The respondent was unable to secure any loan from the appellant's panel of end financiers due to the economic situation at the time. The respondent said that from his enquiries with the banks, the banks were unwilling to finance purchase of properties for investment. By letter dated 10 February 1998, the respondent informed the appellant that he was not proceeding with the purchase of Lot 50 due to difficulties in obtaining bank loan. The respondent also expressed his interest in the appellant's Special Payment Scheme (SPS) for the purchase of Lots 48 and 49 and asked for clarification.

**[10]** The appellant replied by letter dated 11 February 1998 proposing to apply the Special Payment Scheme (SPS) for Lots 48, 49 and 50 if Standard Chartered Bank, a bank on the appellant's panel of end financiers, rejected the respondent's loan application. However, the respondent wrote to the appellant on 28 February 1998 reiterating the respondent's earlier agreement to cancel his purchase of Lot 50 and confirming his purchase of Lots 48 and 49. The respondent then requested for a refund of the monies paid for Lot 50 or to transfer those monies to the accounts of Lots 48 and 49.

**[11]** In a letter dated 4 March 1998 the appellant denied agreeing to cancel the respondent's purchase of Lot 50 and suggested that the respondent find another buyer for Lot 50. The appellant also refused to refund the monies paid for Lot 50.

**[12]** Later the appellant agreed to terminate the respondent's purchase of Lot 50. Due to the respondent's cancellation of the purchase of Lot 50, the appellant withdrew its proposal for the SPS. However the respondent requested for the SPS in the event that he was unable to secure bank loan. The respondent also indicated that he was unable to make further payment.

**[13]** The appellant then agreed to place Lots 48 and 49 under the Special Payment Scheme (SPS) and stated the terms of the scheme. The respondent disagreed with the repayment period of two years set by the appellant. The respondent then decided to discontinue the purchase of Lots 48 and 49. The appellant then revised the repayment terms but the respondent counter proposed. The respondent disagreed with the appellant's repayment schedule and wanted to call off the transactions. However, the appellant refused and indicated that it will forfeit the respondent's monies if he cancelled his purchases.

**[14]** On 1 March 1999 the appellant made new proposals to the respondent for Lots 48 and 49 and stated that if the respondent failed to execute the sale and purchase agreement within 14 days, the appellant will terminate the sale. On 7 April 1999 the appellant terminated the sale and forfeited the respondent's monies based on the terms in the sale proforma forms. There were further correspondences exchanged between the parties which culminated in the respondent sending a notice of demand through his solicitors.

**[15]** The respondent then filed an action against the appellant. After full trial, the High Court allowed the respondent's claim with costs. The High Court subsequently dismissed the appellant's counterclaim with costs. Hence, this appeal.

**The Appellant's Contention**

**[16]** The appellant contended that there was a binding agreement between the respondent and the appellant based on the sale proforma forms which the respondent signed as well as on the exchange of correspondences between the parties. The appellant averred that the delay in signing the SPA was due to the delay by the respondent in setting up the company which the respondent wanted to use to purchase the properties. The appellant contended that at all material times, the appellant was willing to sell the four shoplots to the respondent. The respondent had also indicated his willingness to sign the SPA; to negotiate the terms of the Special Payment Scheme (SPS); and the balance purchase price was paid by the respondent in stages. All these had induced the appellant to believe that the respondent wished to have a contract with the appellant. The signing of the SPA was a mere formality. The respondent was in breach of the agreement for failure to proceed with the purchase of the properties. Therefore, the appellant submitted that the respondent is not entitled to the refund of the deposits and part payments for the purchase price which had been paid to the appellant.

**The Respondent's Contention**

**[17]** The respondent on the other hand contended that he made the purchases due to the assurance made by the appellant that he would be able to obtain loan from the appellant's panel of banks for the purchase. The respondent submitted there was no

SPA executed by the parties because the respondent could not obtain bank loan for the purchases and the parties could not agree on the terms and the conditions of the Special Payment Scheme (SPS). Therefore, the respondent could not proceed with the purchases of the property. The respondent further submitted that the appellant is not entitled to forfeit the deposits and the part payment of the purchase price.

**[18]** In addition, the respondent submitted that the bank loan was a condition precedent to the purchases and that the appellant's staff had given assurance with regard to the loan. As the appellant has failed to honour its assurance with regard to the bank loan, the appellant was in breach and thus not entitled to forfeit the deposits and money paid.

## Decision Of The Court

**[19]** The relevant questions that arose were whether there was a concluded contract/agreement between the parties and if the answer is in the affirmative, whether the respondent was in breach of the contract when he discontinued the purchase of Lots 48 and 49; and ultimately whether the respondent was entitled to the refund of the deposits and part payments he had paid to the appellant.

**[20]** First and foremost it must be stressed that in general the court is guided by the principle that the law leans in favour of upholding bargains between parties and not in striking them down (see: *Hillas & Co. v. Arcos Ltd* [1932] All ER Rep 494; and *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625).

**[21]** Generally, an agreement to make an agreement does not result in a contract. However, it is for the court in each case to construe the correspondence exchanged between the parties as well as the conduct of the parties to determine the result intended by the parties. If the court finds that the parties intended that there should be no concluded contract until a formal sale and purchase agreement had been executed by them, then the conclusion must be "no binding contract between them". On the contrary, if the court finds that the parties had intended to create a legal contract between them just by referring to the exchange of correspondences and the conducts between the parties, then

the conclusion must be "there is a binding and enforceable contract between them", even though there is no written formal sale and purchase agreement executed by them. In that case, objectively speaking, the parties had already made a contract and the written formal contract was a mere formality. The parties were already *ad idem* without the need of a formal sale and purchase agreement.

**[22]** Gopal Sri Ram, JCA in the case of *Charles Grenier Sdn Bhd (supra)* had the opportunity to deal with the same subject matter and held:

> They had identified the parties to the transaction, the property, the price and the terms they considered essential with sufficient clarity. Such an agreement was termed an 'open contract'. It was enforceable as if it was embodied in a document with all the attendant solemnity. In order to give it effect, the law will, acting out of necessity, imply terms into the contract for sale in order to make it work (see 335I and 336A-C); *Liverpool City Council v. Irwin* [1977] AC 239 and *Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai* [1986] 3 SCC 300 followed.

**[23]** In the present case, on the facts, the court is satisfied that there was a concluded contract between the appellant and the respondent despite the want of a duly executed formal written agreement. All the necessary ingredients to constitute a contract were in existence through the sales proforma forms signed by the respondent, the exchange of correspondences that follows as well as the conducts of the parties. There was an offer by the parties; there was consideration, certainty of parties, certainty of the property (ie, Lots 48 and 49) and certainty of the price for the two lots in question. Also there were the unequivocal acts of part payments or part performance by the respondent which were referable to an existing contract between the parties.

**[24]** The sale proforma forms by themselves are sufficient to create concluded contracts between the parties. However, subsequent correspondences between them strengthen their intention to create a binding contract between them. The exchange of letters between them (altogether 24 letters dated 10 February 1998 up to 20 October 1999) clearly show that the appellant was trying to accommodate the respondent all the while by granting indulgence after indulgence to the respondent, particularly with regard to mode of payments and financial assistance for the purchase.

**[25]** It is clear from the letters above that notwithstanding the fact that the appellant was not under a duty to accommodate the respondent after a binding contract existed between them, the appellant was very accommodative and on goodwill basis had allowed the respondent to cancel the purchase of Lots 50 and 51, on the understanding that the respondent would sign the sale and purchase agreements for the remaining lots.

**[26]** The above letters clearly show that the discussion on the indulgence for payment to purchase the said four shoplots under the Special Payment Scheme (SPS) had gone on from February 1998 until 1999, and after the contract to purchase had come into existence as early as 6 November 1996 and as such the letters and discussion should not have the effect of effecting the existing contract that had come into existence between the parties.

**[27]** The letters also show that the terms and conditions as contained in the sale proforma forms had been agreed upon and were never objected to, therefore the contract to purchase the four shoplots had already come into existence when the respondent booked the shoplots and signed the sale proforma forms. Failure of the respondent to adhere to it amounts to a repudiation of the contract to purchase resulting in the right of the appellant to terminate the contract and to forfeit the deposits and payments made.

**[28]** At all material times the appellant was willing to proceed with the sale and purchase of the properties to the respondent, but it was the respondent who refused to sign the formal agreement and to proceed with the purchase and *via* his letter dated 1 October 1999 and 20 October 1999, he had asked the appellant to refund all the monies that he had paid earlier.

**[29]** The present case comes within the rule laid down in *Cornish v. Abington* 4H & N549; 28 LJ (Ex) 262, that "if any person by actual expressions or by a course of conduct, so conducts himself that another may reasonably infer the existence of an agreement or license, and acts upon such inference, whether the former intends that he should do so or not, the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."

**[30]** As stated earlier, at all material times, the appellant was willing to sell the four shoplots to the respondent. The appellant also had agreed to grant time indulgence for the signing of the formal sale and purchase agreement and for the payment of the purchase price requested by the respondent from 1996 till the year 1999 and the time indulgence granted under the Special Payment Scheme (SPS). The respondent had in his letter stated his willingness to sign the formal sale and purchase agreement in the year 1998, but the respondent at the end discontinued the purchase of all the lots without signing the sale and purchase agreement in the year 1998. (The respondent's letters dated 24 March 1997, 15 August 1997, 8 June 1998 and 30 April 1999 are relevant in showing that the respondent had promised to sign the sale and purchase agreement).

**[31]** The respondent had paid almost 60% of the purchase price of the shoplots. After the respondent had signed the sales proforma forms and in the course of discussion with the appellant on the indulgence under the said Special Payment Scheme (SPS), the respondent had made payments of purchase price for the Lot 50, Lot 51, Lot 49 and Lot 48 as follows:

**Lot 48**

| **Date of payments** | |
|---|---|
| 2 November 1996 | RM20,000.00 |
| 17 March 1997 | RM69,500.00 |
| 15 August 1997 | RM73,000.00 |
| 28 November 1997 | RM116,000.00 |
| 9 June 1998 | RM46,500.00 |
| | RM325,000.00 |

**Lot 49**

| **Date of payments** | |
|---|---|
| 2 November 1996 | RM20,000.00 |
| 4 January 1997 | RM49,500.00 |
| 15 August 1997 | RM69,500.00 |
| 29 November 1997 | RM69,500.00 |
| | RM208,500.00 |

**Lot 50**

**Date of payments**

| | |
|---|---|
| 2 November 1996 | RM20,000.00 |
| 4 January 1997 | RM47,500.00 |
| 8 March 1997 | RM2,000.00 |
| 15 August 1997 | RM69,500.00 |
| | RM139,000.00 |

**Lot 51**

**Date of payments**

| | |
|---|---|
| 2 November 1996 | RM20,000.00 |
| 4 January 1997 | RM49,500.00 |
| | RM69,000.00 |

These part payments clearly indicate that the parties had intended to create a legally binding contract, despite the fact that no formal contract was signed by them.

**[32]** The contract had been partly performed. 60% of the purchase price for the shoplots had been paid by the respondent, in the course of discussion with the appellant for the indulgence under the Special Payment Scheme (SPS), (which the appellant was not obliged to grant). In *Lin Nyuk Chan v. Wong Sz Tsin* [1964] 1 LNS 94, Wylie CJ (Borneo) after a discussion of the authorities said:

> All these cases illustrate the length to which a court of equity will go in seeing that an agreement which is partly performed, should be fully carried out by both parties, notwithstanding uncertainty in the terms of the agreement, and the lengths to which such a court will go to resolve these uncertainties so that full performance can be ordered.

**[33]** The respondent contended that he made the purchase due to the assurance made by the appellant that he would be able to obtain loan from the appellant's panel of bank to finance the purchases. To the respondent, he could not execute the sale and

purchase agreement because he could not obtain bank loan to finance the purchases. The respondent further submitted that the bank loan was a condition precedent to the purchases.

**[34]** The court is not in agreement with the respondent on this issue. The evidence shows that the respondent never informed of his financial incapacity to purchase as he never indicated his requirement of a loan when he signed the sales proforma forms. In fact, it was as late as 10 February 1998 (a lapse of more than 14 months from the date of his signing the sales proforma forms) that he first indicated his requirement of a loan to finance the purchase of the shoplots.

**[35]** In his evidence during cross-examination in court, the respondent could not show any document issued by the appellant to show that the appellant had given him an assurance that he would be able to obtain loan from the appellant's panel of banks. The respondent also could not remember which staff member of the appellant who had given him such an assurance. In fact the respondent had not indicated in the sales proforma forms that he required loan or any form of financial assistance for the purchases. The relevant column relating to 'loan requirement' in the sales proforma forms was left unmarked.

**[36]** It was only on 29 June 1998 after a lapse of more than 19 months, that the respondent informed the appellant that Standard Chartered Bank had rejected his application for loan; and it was only on 30 April 1999 after more than 29 months, that the respondent informed the appellant that Public Berhad and Pacific Bank, had also rejected his loan application.

**[37]** The issue about the Special Payment Scheme (SPS) as requested by the respondent came into the picture after the respondent had failed to obtain loan facility from the banks. It was long after the contract between the parties based on the sales proforma forms had been signed and concluded. The Special Payment Scheme (SPS) was only to lessen the respondent's burden as he claimed he could not obtain bank loan. It was subject to terms and conditions to be agreed upon. But all proposals by the appellant were rejected by the respondent without any reasonable grounds and as such the time indulgence under the Special Payment Scheme (SPS) is not binding; and therefore the only contract that existed between the parties is in the sales proforma forms with terms and conditions already agreed upon by both parties.

**[38]** Therefore, the respondent could not terminate the purchase of the four shoplots solely on the ground that he was unable to obtain loan from the banks or that he was not agreeable to the time indulgence given by the appellant under the Special Payment Scheme (SPS), as the agreement between the appellant and the respondent had already come into existence as soon as the respondent signed the sales proforma forms and paid the deposits. Whatever transpired after that, does not affect the contract which had already come into existence.

**[39]** In the sales proforma forms signed by the respondent, there was no provision to say that the contract was conditional upon the respondent getting a loan in order to perform his obligations under the contract. The respondent did not state that he needed a loan when the proforma forms were signed by him notwithstanding that there was a column in the form for indicating his requirement for a loan. The respondent claimed that he was given promise that if he could not get 80% loan, his money would be refunded; but he could not show any document signed by the appellant when he was cross-examined on this and could not remember which staff of the appellant who made the said promise to him. Therefore the conclusion that can be drawn is that no such promise was ever made by the appellant or any member of its staff to the respondent.

**[40]** There is also no provision in the sales proforma forms signed by the respondent that the respondent is entitled to the refund of the monies paid as deposits and part payments towards the purchase price of the properties, in the event the respondent chooses not to proceed with the purchase of the properties. The respondent knew right from beginning that the deposits payments as well as the other part payments made were part of the purchase price which he had to pay for the said shoplots under the contract as stipulated in the sales proforma forms. Under the contract these are "moneys paid under compulsion of law". The respondent can only recover the moneys if they were paid without knowledge of the real facts ie, in ignorance of facts which, if they had been known, would have left him an option whether he would pay or not. The rule was laid down by Patteson J in *Duke of Cadaval v. Collins*, 4 A & E, 858, as cited in *Thomas v. Brown* [1876] Queen's Bench Division, Vol. 1 p. 714, that moneys paid

under compulsion of law cannot be recovered back as money had and received. It was further held in that case that where there is *bona fides* and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back.

**[41]** In the above case, *(Thomas v. Brown)* Mellor J had expressed the following sentiment on the same issue:

> Now, is there anything unconscientious in the Defendant keeping this money? I can see nothing. The breaking off of the agreement was not in any sense the fault of the vendor. He was always ready and willing to complete the purchase and execute a conveyance, but the vendee chooses to set up his question about the Statute of Frauds, and to say. "Although I can have the contract performed if I please, I repudiate it." Under these circumstances, I think it would be quite monstrous if the Plaintiff could recover, and I am glad to think that the authorities are all opposed to her claim.

**[42]** In the same case *(Thomas v. Brown)* Quain J expressed the following observations:

> Now where, upon a verbal contract for the sale of land, the purchaser pays the deposit and the vendor is always ready and willing to complete, I know of no authority to support the purchaser in bringing an action to recover back the money.

**[43]** In the present case, at all material times the appellant was ready and willing to sell the four shoplots in question. The appellant had also agreed time indulgence for signing of the formal sale and purchase agreement and for payment of the purchase price requested by the respondent from 1996 till the year 1999 and the time indulgence granted under the Special Payment Scheme (SPS). The respondent had also in his letter indicated his willingness to sign the sale and purchase agreement in the year 1998 but the respondent at the end discontinued and terminated the purchase of all the shoplots without signing the sale and purchase agreement.

**[44]** Applying the principle in *Thomas v. Brown* (above) the court is of the view that the respondent in the present case is not entitled to the refund of the deposits as well as all the part payments made in respect of the purchase of the shoplots.

A

## Conclusion

**[45]** Based on the above considerations, the court made the following findings, namely:

B

(a) that there was a concluded contract between the respondent and the appellant on the sales and purchases of the four shoplots based on the sales proforma forms signed by the respondent as well as the payments of deposits and part payments towards the purchase price of the lots;

C

(b) that the respondent was in breach of the said contract when he failed to proceed with the purchase of the shoplots and terminated the contract when the appellant was ready and willing to complete the sales; and

D

(c) that the respondent is not entitled to the refunds of the moneys paid as deposits as well as part payments for the purchase price of the shoplots.

**[46]** The appeal is therefore allowed with costs of RM20,000 to be paid to the appellant. The order of the learned High Court judge is set-aside. Deposit to be refunded.

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